17-323

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 249.

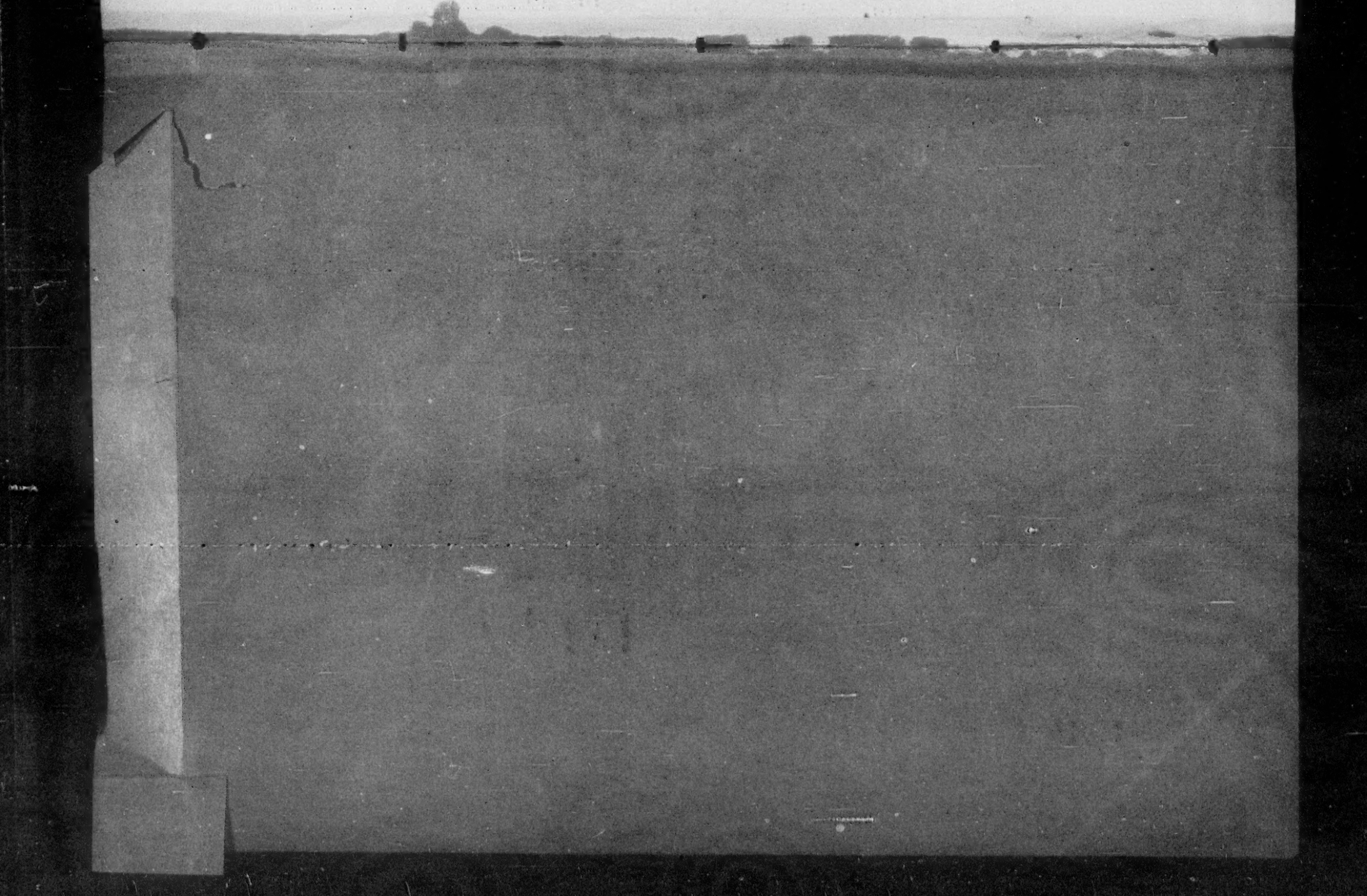
S. V. TREDWAY AND DAVID KETTELMAN, APPELLANTS,

vs.

CHARLES W. SANGER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 5, 1880.



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1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California. In equity.

The President of the United States of America, greeting, to S. V. Tredway and David Kettelman:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of February, A. D. 1879, to answer a bill of complaint exhibited against you in said court by Charles W. Sanger, who is a
2 citizen of the State of Pennsylvania, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of December, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:)

OFFICE U. S. MARSHAL, DISTRICT OF CALIFORNIA.

I hereby certify that I received the within subpœna on the 23d day of January, 1879, and personally served the same on the 15th day of
3 February, 1879, by delivering to and leaving with S. V. Tredway and David Kettelman, said defendants, personally, in the county of San Joaquin, in said district, an attested copy of said subpœna, together with a certified copy of bill of complaint attached thereto.

San Francisco, February 17th, 1879.

A. W. POOLE,
U. S. Marshal.
By C. H. PETERSON,
Deputy.

Filed 17th Feb'ry, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

4 *Bill of complaint.*

In the circuit court of the United States, ninth circuit, for the district of California.

CHARLES W. SANGER, COMPLAINANT,
vs.
S. V. TREDWAY AND DAVID KETTELMAN, defendants.

Charles W. Sanger, the complainant herein, complains of the defendants S. V. Tredway and David Kettelman, and says:

That said complainant, Charles W. Sanger, is now, and has been at all

the times hereinafter mentioned, a resident and citizen of the State of Pennsylvania.

That said defendants, S. V. Tredway and David Kettelman, each, are now, and have been at all the times hereinafter mentioned, resi-
5 dents and citizens of the State of California.

That on a certain day, to wit, the twenty-eighth day of September, 1875, at the city of San Francisco, in the State of California, the said defendants, S. V. Tredway and David Kettelman, made their promissory notes in writing on that day, in the words and figures following, to wit:

$2,342.52.] SAN FRANCISCO, *September 28th*, 1875.

One year after date, without grace, we promise to pay to Charles McLaughlin, or order, the sum of two thousand three hundred and forty-two & $\frac{52}{100}$ dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon, in like gold coin, at
6 the rate of ten per cent. per annum from date until paid.

S. V. TREDWAY,
DAVID KETTELMAN.

$2,342.52.] SAN FRANCISCO, *September 28th*, 1875.

Two (2) years after date, without grace, we promise to pay to Charles McLaughlin, or order, the sum of two thousand three hundred and forty-two & $\frac{52}{100}$ dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon, in like gold coin, at the rate of ten per cent. per annum from date until paid.

S. V. TREDWAY.
DAVID KETTELMAN.

And then and there delivered the same to Charles McLaughlin, the payee named in said promissory note.

That the said defendants, S. V. Tredway and David Kettelman, to secure the payment of said principal sum, and interest thereon, as
7 mentioned in said promissory notes, according to the tenor thereof, did at the same time and place execute, under their hands and seals, and deliver to the said Charles McLaughlin a certain mortgage, bearing date on that day, and conditioned for the payment of the said sum of four thousand six hundred and eighty-five and $\frac{04}{100}$ dollars, in gold coin, and interest thereon, at the rate and at the time and in the manner specified in said mortgage and said promissory notes, and according to the conditions thereof, which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the fifth day of October, 1875, duly recorded in the office of the county recorder of the county of San Joaquin, State of California, in book B, volume 21, of mortgages, page 271 et seq. A copy of said mortgage, with
8 the endorsements thereon, is hereto annexed, marked Exhibit A, and made a part of this bill.

That said Charles McLaughlin thereafter endorsed said promissory notes, and delivered them so endorsed to one W. H. Dillon.

That said W. H. Dillon thereafter endorsed said promissory notes, and delivered them so endorsed, and the complainant thereafter became, and now is, the owner and holder thereof for value.

That no part of the interest on the said principal sums mentioned in said promissory notes, and in said mortgage, or of said principal sums mentioned in said notes and mortgage, have been paid, but that all the principal sums mentioned in said promissory notes and mortgage, together with the interest thereon, at the rate of ten per cent. per annum from the twenty-eighth day of September, 1875, still remains due and unpaid, though complainant has demanded payment thereof.

That the amount in controversy herein exceeds the sum of five hundred dollars, exclusive of costs.

That this suit is brought under an act of Congress of the United States, approved March 3d, 1875, and complainant is informed and believes that said defendants claim some defense to said notes and the debts secured by said mortgage, arising under the laws of the United States of America.

Wherefore the complainant prays judgment against said defendants, S. V. Tredway and David Kettelman, for the sum of four thousand six hundred and eighty-five and $\frac{04}{100}$ dollars, in gold coin of the United States of America, with interest thereon, in like gold coin, at the rate of ten per cent. per annum from the twenty-eighth day of September, A. D. 1875, and for his costs herein, and solicitors' and counsel fees to be taxed at twenty per cent. of the amount in said notes and mortgage mentioned, as provided for in said mortgage.

That the usual decree be made for the sale of the premises, and every portion thereof according to law and the practice of this court; that the proceeds of said sale of said premises may be applied in payment of the amount due to the complainant, and that said defendants, S. V. Tredway and David Kettelman, and all persons claiming under them or either of them, subsequent to the execution of said mortgage upon said premises, either as purchasers or encumbrancers or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that said complainant may have judgment and execution against said defendants, S. V. Treadway and David Kettelman, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment; that complainant may become purchaser at said sale; that a proper deed be executed to the purchaser, and that said purchaser be let into the possession of the premises on production of the master's deed therefor, and that complainant may have such further relief in the premises as to the court may seem meet and agreeable to equity.

TULLY R. WISE,
Solicitor for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Maurice Casey, being duly sworn according to law, deposes and says that he has read the foregoing bill in equity and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and that as to those matters that he believes it to be true. And affiant further says that he makes this affidavit because the complainant is absent from this State and is unable to verify this bill in equity, and that affiant is acquainted with the facts, and he is the agent of the complainant.

MAURICE CASEY.

Subscribed and sworn to before me this 19th day of December, 1878.
JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

13 This indenture made the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and seventy-five, between S. V. Treadway and David Kettelman, of the county of San Joaquin, State of California, the parties of the first part, and Charles McLaughlin, of the county of San Francisco, State of California, the party of the second part, witnesseth, that the said parties of the first part are justly indebted to the said party of the second part in the sum of four thousand six hundred and eighty-five and $\frac{05}{100}$ dollars, gold coin of the United States of America, upon certain promissory notes made at the date hereof by said S. V. Tredway and David Kettelman, in the words and figures following, to wit:

$2,342.52.] SAN FRANCISCO, *September 28th*, 1875.

14 One year after date, without grace, we promise to pay to Charles McLaughlin, or order, the sum of two thousand three hundred and forty-two and $\frac{52}{100}$ dollars, payable only in gold coin of the Government of the United States, for value received with interest thereon in like gold coin, at the rate of ten (10) per cent. per annum from date until paid.
S. V. TREDWAY.
DAVID KETTLEMAN.

$2,342.52.] SAN FRANCISCO, *September 28th*, 1875.

Two (2) years after date, without grace, we promise to pay to Charles McLaughlin or order the sum of two thousand three hundred forty-two and $\frac{52}{100}$ dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid.
S. V. TREDWAY.
DAVID KETTLEMAN.

15 Now, this indenture witnesseth that for the purpose of securing the payment of the said promissory notes and the interest thereon as it shall become due and payable, the said parties of the first part, for and consideration of the premises, as also in consideration of the sum of one dollar lawful money to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, and confirmed, and by these presents does grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, all of the following-described tracts of land, situated in San Joaquin County, State of California, viz: The south half (S. $\frac{1}{2}$) of section No. thirteen (13), save and excepting a strip of land on the north side of said south half, running entirely across said section, and being thirty-five (35) rods wide, in township No. three (3) north, of range No.
16 five (5) east, containing 250 acres; also the east half of northeast quarter (E. $\frac{1}{2}$ of NE. $\frac{1}{4}$) of section No. twenty-three (23), in same township, containing 80 acres; and the fractional north half of northwest quarter (N. $\frac{1}{2}$ of NW. $\frac{1}{4}$) of section No. nineteen (19), in township No. three (3) north, of range No. six (6) east, containing seventy-nine and $\frac{25}{100}$ acres, and lot No. three (3), the south half of southeast quarter (S. $\frac{1}{2}$ of

SE. ¼) of section No. thirty-three (33), in township No. four (4), north of range No. seven (7) east, containing 89 $\frac{90}{100}$ acres; all of said tracts of land being of the Mount Diablo base and meridian, according to United States surveys, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining: To have and to hold the said premises, with all the tenements, hereditaments, and appurtenances thereunto belonging, unto the said party of the sec-
17 ond part, his heirs and assigns forever: Provided, nevertheless, that if the said parties of the first part shall well and truly pay or cause to be paid the said promissory notes, with the interest as it shall become due and payable thereon, according to the tenor and effect thereof, then, in such case, this indenture and the estate hereby granted shall be null and void; else to remain in full force and virtue.

But it is distinctly understood and agreed that if the interest on said promissory notes, or the principal thereof, shall not be punctually paid when the same becomes due and payable, as in said promissory notes mentioned, then, and in such case, the principal sum of said promissory notes and the interest shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said party of the sec-
18 ond part, his heirs, executors, administrators, or assigns, for the recovery of the same, either by suit on said notes or on this mortgage, anything in said notes or in this indenture contained to the contrary thereof notwithstanding. And in any suit or other proceedings that may be had for the recovery of the said principal sum and interest on either of said notes or this mortgage, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit not exceeding twenty per cent. of the amount of this mortgage, as well as all payments that the said party of the second part, his heirs, executors, administrators or assigns may be obliged to make for his and their security, or on account of any taxes, charges, incumbrances, or assessments whatsoever, on said premises.

19 In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

S. V. TREDWAY. [SEAL.]
DAVID KETTELMAN. [SEAL.]

Signed, sealed, and delivered in the presence of—
R. E. WILHOIT.

STATE OF CALIFORNIA,
County of San Joaquin, ss:

On this first day of October, in the year one thousand eight hundred and seventy-five, before me, Roley E. Wilhoit, a notary public in and for the county aforesaid, personally appeared S. V. Tredway and David Kettleman, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In testimony whereof I have hereunto set my hand and affixed
20 my official seal the day and year in this certificate first above written.

[SEAL.]

ROLEY E. WILHOIT,
Notary Public, San Joaquin County, Cal.

(Endorsed:) Mortgage. S. V. Tredway & David Kettleman to Charles McLaughlin.

Recorded at the request of Charles McLaughlin, Oct. 5, A. D. 1875, at 35 minutes past 9 o'cl'k a. m., in book B, vol. 21 of mortgages, pages, 271 to 275, San Joaquin County records.

C. T. ELLIOTT,
Co. Recorder,
By A. M. NOBLE, *Dep'ty.*

3.75.

21 Filed Dec'r 19th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

22 *Plea in abatement.*

In the circuit court of the United States, ninth circuit, for the district of California.

CHARLES W. SANGER, COMPLAINANT,
vs.
S. V. TREDWAY AND DAVID KETTLEMAN, DEFENDANTS.

The joint and several plea of S. V. Tredway and David Kettleman, defendants to the bill of complaint of Charles W. Sanger, complainant:

The said defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint contained to be true, in such manner and form as the same are therein declared and set forth, say:

23 That Charles McLaughlin, the payee named in the promissory notes declared and set forth in said bill of complaint, and who is the mortgagee named in the mortgage declared and set forth in said bill of complaint, and a copy of which is thereto annexed, is the person to whom said notes were made and said mortgage executed and delivered by these defendants, and that he, the said Charles McLaughlin, was, at the time of the making of said promissory notes and the execution and delivery of said mortgage, and ever since has been, and now is, a citizen of the State of California, and that these defendants were, at the time of the making of said notes and the execution of said mortgage, and ever since have been, and now are, citizens of said State of California, and residents in the county of San Joaquin, State of California.

24 These defendants admit and further say that the complainant, Charles W. Sanger, is, and was at all of the times in said bill of complaint mentioned, a citizen of the State of Pennsylvania, and they further admit that said Charles McLaughlin endorsed said promissory notes and delivered them so endorsed to W. H. Dillon, and that said W. H. Dillon thereafter endorsed the same, and delivered the same so endorsed. But these defendants are informed and believe, and they say and charge the fact to be, that said endorsements and delivery were, and each of them was, colorable merely, and without any consideration whatever therefor, and that said endorsement and delivery by said W. H. Dillon of

said promissory notes were made and done solely for the purpose of conferring on this honorable court jurisdiction to hear and determine this cause; and these defendants say and charge on their information
25 and belief that the said complainant is not the owner and holder of said promissory notes for value.

These defendants further say that the said W. H. Dillon was at the times in said bill of complaint mentioned, and now is, as these defendants are informed and verily believe, a citizen of the State of California.

These defendants further say that it is not true that this suit is brought under an act of Congress of the United States approved March 3d, 1875, and that it is not true that these defendants claim some defense, or any defense, to said notes, or to either of them, and to the debts secured by said mortgage, or to any part of said debts arising under the laws of the United States of America; on the contrary, these defendants say that the defense of these defendants to said notes and to the debts secured by said
26 mortgage does not arise under the laws of the United States of America, and that their defense to either of said notes, or to any part of said debts, does not arise under the laws of the United States of America.

And these defendants further say, that the district court of the fifth judicial district of the State of California, in and for the county of San Joaquin, is a court of competent jurisdiction to determine the matters in question in this suit, therefore these defendants do aver and plead the same, and pray the judgment of this honorable court whether it will hold plea thereupon, and enforce these defendants to answer the said bill for the cause aforesaid, and pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

BYERS & ELLIOTT, & W. L. DUDLEY,
Sol's for Def'ts.

27 I hereby certify that I have read the foregoing plea, and that in my opinion it is well founded in point of law.

J. H. BUDD,
Of Counsel.

UNITED STATES OF AMERICA,
District of California, ss:

S. V. Tredway and David Kettelman, the defendants named in this suit, being severally duly sworn, each deposes and says that he has heard read the foregoing plea and knows the contents thereof, and that it is not interposed for delay, and that it is true in point of fact.

S. V. TREDWAY.
DAVID KETTELMAN.

Subscribed & sworn to before me at Stockton, in the county of San Joaquin, State of California, this 2d day of May, A. D. 1879.

28 JOHN E. BUDD,
Commissioner of the U. S. Circuit Court, Cal.

(Endorsed:)
Service of a certified copy of the within plea hereby admitted.

TULLY R. WISE,
Solicitor for Compl't.

MAY 3, 1879.

Filed May 3d, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

29 *Replication.*

In the circuit court of the United States, ninth circuit, for the district of California.

CHARLES W. SANGER, COMPLAINANT,
vs.
S. V. TREDWAY AND DAVID KETTLEMAN, DEFENDANTS.

And the said complainant says, that the court ought to take further cognizance of and sustain his action aforesaid against said defendants, because complainant says, that said cause of action aforesaid did arise within the jurisdiction of this court, now here, as he hath above alleged, and this he prays may be inquired of by the country.

TULLY R. WISE,
Solicitor for Complainant.

30 UNITED STATES OF AMERICA, *ss:*

G. D. Newhall, being duly sworn, according to law, deposes and says that he is the agent of the complainant in the above-entitled action; that he has heard read the foregoing replication, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; and affiant further says that he makes this affidavit because the complainant is absent from this State, and is unable to verify this replication, and affiant is acquainted with the facts.

G. D. NEWHALL.

Subscribed and sworn to before me this 7th day of January, A. D. 1879.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

31 (Endorsed:) Filed 7 June, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

32 *Stipulation.*

In the circuit court of the United States, ninth circuit, district of California.

CHARLES W. SANGER, COMPLAINANT,
vs.
S. V. TREDWAY & DAVID KETTLEMAN, DEFENDANTS.

It is stipulated and agreed for the purpose of the trial of the plea in abatement in this action that S. V. Tredway and David Kettleman, the said defendants, and who are the makers of the note and the mortgagers

mentioned in the bill of complaint in this action, and that Chas. McLaughlin, the payee of said note and the mortgagee named in said mortgage, were, at the time of the making of said note and *and* of the
33 execution of said mortgage, and have been ever since, and now are, residents and citizens of the State of California, and that Charles W. Sanger, the complainant in this action, was, at the commencement of this action, and had been for a long time previous, and has been ever since the commencement of the action, and is now, a bona fide resident and citizen of the State of Pennsylvania.

Dated Sept. 11th, 1879.

BYERS & ELLIOTT,
Att'ys for Defendants.

Dated Sept. 11th, 1879.

J. H. BUDD,
Of Counsel for Def'ts.
TULLY R. WISE,
Solicitor for Pl'ff.

(Endorsed:) Filed September 11, 1879. L. S. B. Sawyer, clerk.

34 At a stated term of the circuit court of the United States of America for the district of California, held in the court-room in the city and county of San Francisco, on Saturday, the sixth day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Lorenzo Sawyer, circuit judge.

Enrollment.

CHARLES W. SANGER, COMPLAINANT,
vs.
S. V. TREDWAY AND DAVID KETTLEMAN, DEFENDANTS.

The complainant herein filed his bill of complaint, which is hereto annexed, on the 19th day of December, A. D. 1878.

35 Thereupon a subpœna to appear and answer said bill was issued, returnable on the first Monday of February, A. D. 1879, and service thereof made upon said defendants, S. V. Tredway and David Kettelman, as will appear by the marshal's return endorsed thereon. Said subpœna is hereto annexed.

The defendants appeared herein by Messrs. Byers & Elliott, and W. L. Dudley, esq're, as their solicitors, and J. H. Budd, esq're, as counsel, and on the 3d of May, 1879, filed a plea in abatement, which is hereto annexed.

On the 7th day of June, A. D. 1879, complainant filed a replication to said plea, which replication is hereto annexed.

On the 11th day of September, A. D. 1879, a stipulation of facts, &c., was filed, which is also hereto annexed, and on said last-named day
36 an order was made and entered herein in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America

for the district of California, held at the court room in the city and county of San Francisco on Thursday, the 11th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Lorenzo Sawyer, circuit judge.

CHAS. W. SANGER
vs.
S. V. TREDWAY ET AL.

This cause coming on this day to be heard upon the plea in abatement herein, Mr. Byers and J. H. Budd, esq., appearing on behalf of the
37 said plea and the defendants, and Tully R. Wise, esq., in opposition to said plea and in support of the bill of complaint herein, was argued and submitted to the court for consideration and decision. And the same having been duly considered, it is ordered that said plea in abatement be, and the same hereby is, not found true (and insufficient). And it is further ordered that defendants be required to answer bill on or before the first Monday of October next.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled action.

Attest my hand and seal of said circuit court, this 6th day of December, A. D. 1879.

L. S. B. SAWYEB, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

38 Thereafter, to wit, on the 27th day of October, A. D. 1879, a rule was entered in the order or common rule book in equity of said court, on page 433, in the words and figures following, to wit:

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

CHARLES W. SANGER
vs.
S. V. TREDWAY ET AL. } 2032.

The defendants herein having interposed a plea in abatement to the bill of complaint in the above-entitled suit, and complainant having filed a replication thereto, and this cause having come on to be heard be-
39 fore the court upon said issue, the honorable Lorenzo Sawyer, circuit judge, presiding, and the matter having been argued and submitted to the court for consideration and decision, and the court being duly advised thereon, did, on the 11th day of September, A. D. 1879, find that said plea was not true and insufficient, and the time within which said defendants and each of them, to wit, October 6th, A. D. 1879, should have answered said bill having expired, and no answer having been filed by said defendants, or either of them: Now, therefore, on motion of Tully R. Wise, esq're, solicitor of complainant, it is hereby ordered that the default of defendants S. V. Tredway and David Kettelman, and of each of them, for failure to answer unto said bill of complaint be and the same

is hereby entered, and that all matters and things therein prayed for be decreed accordingly.

40 Entered October 27th, A. D. 1879.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Dep'y Clerk.

Thereafter a final decree was filed and entered herein, in the words and figures following, to wit:

Enrollment final decree.

In the circuit court of the United states, ninth circuit, district of California.

CHARLES W. SANGER, PLAINTIFF, *vs.* S. V. TREDWAY AND DAVID KETTELMAN, DEFENDANTS.	Decree of foreclosure and sale.

In this case the defendants having been regularly served with
41 process, and having appeared, and having interposed a plea in abatement to the bill of complaint in the above-entitled cause, and the complainant having filed a replication thereto, and this cause having come on to be heard before the court upon said issue, the honorable Lorenzo Sawyer presiding, and the matter having been tried, argued, and submitted to the court for consideration and decision, and the court being duly advised therein, did, on the 11th day of September, A. D. 1879, find that said plea was not true, and was insufficient, and the time within which said defendants, and each of them, to wit, October 6th, A. D. 1879, should have answered said bill having expired, and no answer having been filed by said defendants, or either of them, and the defaults of said defendants, S. V. Tredway and David Kettelman, having been regularly entered
42 for want of an answer unto said bill of complaint, and the said defaults having been entered on the 29th day of October, A. D. 1879, and the said bill being taken as confessed:

Now, upon this 6th day of December, A. D. 1879, at the November term of this court, this case came up for disposition in conformity with the rules of equity, and the plaintiff appearing, by his solicitor, Tully R. Wise, and having produced his proofs, and the same having been submitted to the court, it is ordered, adjudged, and decreed that there is due to the plaintiff from the defendants sixty-six hundred and forty-seven $\frac{52}{100}$ dollars, principal and interest, in gold coin of the United States of America, and three hundred and thirty-five dollars counsel fees, and that the plaintiff has a lien upon the mortgaged premises for the payment of the
43 same; and the same is secured by the mortgage upon the premises hereinafter described, and that said sums bear interest at seven per cent. per annum from the date of this decree.

It is further ordered, adjudged, and decreed that S. C. Houghton be appointed a special master of this court to sell said land under this decree, and he is hereby authorized and directed to make, conduct, and carry out

the sale hereinafter mentioned, upon the delivery to him of a copy of this decree.

And it is further ordered, adjudged, and decreed that said land and premises be sold at the court-house door of San Joaquin County, between the hours of nine in the morning and five in the afternoon, in one parcel, by the said master, at public auction, to the highest bidder for cash, in gold coin of the United States, and that previous written notice of the sale
44 be given by posting the same for twenty days in three public places of the township where the property is situated and where it is to be sold, and by publishing a copy thereof once a week for the same period in some newspaper, if there be one published in the county, which shall contain a description of the property, and shall specify the time and place of sale, and must state that bids must be made in gold coin; that the master be authorized to adjourn the sale from time to time as he may deem advisable; that if the purchaser refuse to pay the amount bid, the master may again sell the property at any time to the highest bidder, and may reject any bid of such person; that plaintiff may purchase the property, or any other person, and that the amount of his bid be credited on the
45 sums due to him under this decree, but that he shall pay the surplus in cash to the master, and also sufficient cash to satisfy the costs and expenses of the sale and the master's commissions.

And it is further ordered, adjudged, and decreed that the property shall be sold subject to redemption according to the laws of California, and the master shall give to the purchaser a certificate of sale containing a description of the property sold and the price bid and paid, and showing that the sale is subject to redemption in gold coin of the United States, a duplicate of which certificate must be filed by said master in the office of the recorder of said county, and that after the time for redemption shall have expired the master shall execute to the purchaser, if there be no redemption, or to the redemptioner, if redemption be made, a
46 deed of conveyance of the property sold; that the purchaser from time of sale until redemption, or, if there be no redemption, until the delivery of the master's deed, and a redemption from the time of his redemption until another redemption, or, if there be no other redemption, until the delivery of the master's deed, shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use of the same and occupation thereof; that the purchaser be let into possession of the property sold upon production of the master's deed, and that any parties to this action, and any person or persons claiming under them, or any of them, who may be in possession of the premises sold shall deliver possession to the purchaser upon production of the master's deed, and that the defendants and all persons claiming under them,
47 or any of them, be, and they are hereby, enjoined from committing waste on said premises.

And it is further ordered, adjudged, and decreed that the said sale shall in all respects be conducted in accordance with law and the rules and practice of this court, and that out of the proceeds of the sale the said master, after deducting his costs, expenses, and commissions, and the amount of any liens upon the premises sold at the time of the sale for taxes or assessments shall pay in said coin to the plaintiff or his solicitor:

First. His costs and disbursements, taxed herein at ninety $\frac{90}{100}$ ($90\frac{90}{100}$) dollars.

Secondly. All taxes and assessments and liens paid by plaintiff since this decree.

Thirdly. The amounts hereinbefore decreed to be due to the
48 plaintiff, with interest at seven per cent. per annum from the date of this decree.

And it is further ordered, adjudged, and decreed that if the proceeds are insufficient to pay the expenses of sale, the master's commissions, the costs of action, and the amount due the plaintiff, the master shall specify the deficiency in his report of the sale, and upon the coming in of such report the clerk of this court shall docket a judgment of this court for the amount of such deficiency in said gold coin and execution therefor against the said defendants, S. V. Tredway and David Kettleman, and that such judgment shall bear interest at seven per cent. per annum, and in case of a surplus the master report the same, and pay it into this court to abide the order of court.

And in case there is no redemption, the defendants, and every
49 person claiming under them, are barred and foreclosed of all right, title, or equity in the premises.

The mortgaged premises and the premises ordered to be sold are described as follows, to wit: All of the following described tracts of land situated in San Joaquin County, State of California, viz, the south half (S. $\frac{1}{2}$) of section No. thirteen (13), save and excepting a strip of land on the north side of said south half running entirely across said section and being thirty-five (35) rods wide, in township No. three (3) north, of range No. five (5) east, containing 250 acres; also the east half of northeast quarter (E. $\frac{1}{2}$ NE. $\frac{1}{4}$) of section No. twenty-three (23) in same township, containing 80 acres, and the fractional north half of northwest quarter (N. $\frac{1}{2}$ of NW. $\frac{1}{4}$) of section No. nineteen (19), in township No. three (3) north, of range No. six (6) east, containing seventy-nine and $\frac{25}{100}$
50 acres, and lot No. three, the south half of southeast quarter (S. $\frac{1}{2}$ of SE. $\frac{1}{4}$) of section No. thirty-three (33), in township No. four (4) north, of range No. seven (7) east, containing 89.90 acres. All of said tracts of land being of the Mount Diablo base and meridian according to United States surveys.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered December 6th, A. D. 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

51 *Certificate to enrolled papers.*

Whereupon said pleadings, stipulations, subpœna, order, rule, and final decree are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Dep'y Cl'k.

(Endorsed:) Enrolled papers. Filed December 6th, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

52 At a stated term of the circuit court of the United States of America for the district of California, held at the court-room, in the

city, and county of San Francisco, on Thursday, the 18th day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Lorenzo Sawyer, circuit judge.

Order granting appeal.

CHARLES W. SANGER
vs.
S. V. TREDWAY AND DAVID KETTELMAN.

On motion of Messrs. Byers & Elliott, solicitors for the defendants herein, it is ordered that an appeal to the Supreme Court of the United States of America from the decree made and entered herein on the
53 sixth day of December, A. D. 1879, of the November term, A. D. 1879, of this court be and the same is hereby allowed.

And it is further ordered that a certified transcript of the pleadings, stipulations, and proceedings in the above-entitled cause be forthwith transmitted to the Supreme Court of the United States, upon the appellant giving a bond in the sum of nine thousand five hundred dollars, gold coin of the United States.

54 *Bond on appeal.*

In the Supreme Court of the United States of America.

S. V. TREDWAY AND DAVID KETTELMAN APPELLANT
vs.
CHARLES W. SANGER, APPELLEE.

Know all men by these presents that we, Henry Barnhart and James C. Smith, as sureties, are held and firmly bound unto Charles W. Sanger in the sum of nine thousand five hundred dollars, gold coin of the United States of America, to be paid to the said Charles W. Sanger, his heirs, executors, and administrators; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and
55 our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated this nineteenth day of December, A. D. 1879.

Whereas the above-named S. V. Tredway and David Kettelman have taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered by the circuit court of the United States of the ninth judicial circuit in and for the district of California, in the suit entitled Charles W. Sanger versus S. V. Tredway and David Kettelman:

Now, therefore, the condition of this obligation is such that if the above-named S. V. Tredway and David Kettelman shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

56 HENRY BARNHART. [SEAL.]
JAMES C. SMITH. [SEAL.]

Signed, sealed, and delivered in presence of—
HUGH CORCORAN.
JOSEPH H. BUDD.

UNITED STATES OF AMERICA,
District of California, ss:

Henry Barnhart and James C. Smith, being first duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of nine thousand five hundred dollars, gold coin of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

HENRY BARNHART.
JAMES C. SMITH.

Subscribed and sworn to before me this 19th day of December, A. D. 1879.

[SEAL.] HUGH CORCORAN,
Notary Public San Joaquin Co., California.

57 (Endorsed:)

The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
Circuit Judge, Ninth Circuit.

Filed December 23d, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy cl'k.

58 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing fifty-seven written pages, numbered from 1 to 57 inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States therein.

Witness my hand and the seal of said circuit court this 1st day of January, A. D. 1880.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk,

(Indorsement on cover:) No. 249. S. V. Tredway and David Kettelman, appellants, vs. Charles W. Sanger. California C. C. U. S. Filed 5th August, 1880.

17-323
OFFICE SUPREME COURT U.S.
FILED
APR 3 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

S. V. TREDWAY and
DAVID KETTLEMAN, *Appellants;*
vs.
CHARLES W. SANGER.

STATEMENT OF THE CASE.

This is an action to foreclose a mortgage, given to secure two notes made by appellants, residents of California, to Chas. McLaughlin, resident also of California, which notes the petition alleges were assigned to one, Dillon, and by Dillon assigned to Sanger, the complainant who was at the time of the commencement of this action a resident of Pennsylvania. The question involved herein is the jurisdiction of the Circuit Court to hear and determine this action.

Appellants filed their plea in abatement, claiming that the assignments were made solely to give the Court jurisdiction of this action and showing that the original payee of the notes was a resident of California. The various parties are determined by stipulation of counsel. The further question is made whether the Court can consider a complaint not signed by counsel, and whether the replication is sufficient to put in issue the averments of the plea in abatement. There is no averment *when* these notes were assigned, not probably, as appearances indicate until long after they became due by the terms specified. They were allowed to remain in the same condition for nearly two years and a half after that, before this suit was commenced.

Appellants assign as error, that the decree finds the plea in abatement not true and insufficient, notwithstanding the stipulation of facts which show the plea to be well taken.

Appellants claim that the Circuit Court has no jurisdiction of an action to foreclose this mortgage, for the reason that McLaughlin, the original mortagee, could not have maintained the action.

The whole transaction—being the purchase and sale of a tract of land—was betwen residents, then and now, of the State of California, under the laws of California, subject to the jurisdiction of the Courts of California, and we claim that there is not, nor has there been, anything to ever subject it to the jurisdiction of the laws or the Courts of any other State, or of the Federal Courts.

Section 1, Act of March 3, 1875, to determine the jurisdiction of the Circuit Courts, etc.

The stipulation, pages 8 and 9 of the transcript, shows that McLaughlin, mortgagee, is a resident of California; and also appellants. Were this action simply an action at law upon notes given in mercantile transaction, the jurisdiction might not be questioned, except were it not for the undisputed fact that the assignments were made expressly for the purpose of collection.

It will hardly be pretended that every kind of negotiable notes may be made subject to the jurisdiction of the United States Courts, but it should be made to appear that the notes are of the exceptional character of the class specified in the Act of Congress of March 3, 1875. Notes of hand had been excluded entirely from such jurisdiction, and they still are so held by the above act, except a specific class. The presumption would be, on a general statement, without any special and clear

definition, that they only could be brought into the Courts of the State where they were made and where the parties in interest resided. It devolved, therefore, on the complainants before the Circuit Court, to show definitely that the notes were of the exceptional character specified in the Act of Congress, for on their face they did not show it.

But it is an action on the mortgage, asking relief under the terms of the mortgage.

It cannot be claimed that because the notes are involved, the Court has jurisdiction, as it is apparent that no action involving equity jurisdiction could be maintained under the circumstances, for the act clearly provides that only in cases of promissory notes, negotiable *by the law merchant*, or bills of exchange. In any event it cannot be claimed that because the Court may acquire jurisdiction of an action on a note, it also acquires jurisdiction to give relief upon a mortgage which, although it is in one sense, an incident, is yet a distinct and separate contract, containing terms and conditions not contemplated in the note.

In the language of this Court—

SHELDON VS. SILL, 8 How 441,

the foreclosure of a mortgage "is the pursuit of, by one action on two instruments or securities, the one general, the other special"

In that case the parties tried to avoid the effect of the 11th section of the judiciary act as it formerly stood, by claiming that the action was to foreclose the mortgage and not on the note, of which it was not disputed the Court had no jurisdiction. The respondents in this case now under the law as amended, permitting action on notes negotiable by the law merchant, take the opposite position and claim the action to be on the note.

This Court, in Sheldon vs. Sill, did not take issue with the parties on the point that it was a suit on the mortgage, but adjudged that the mortgage was a "chose in action" and hence the Court had no jurisdiction, the original mortagee not being entitled to foreclose in the Circuit Court.

The act as it now stands permits actions on certain notes and drafts, but not on any other contracts, hence complainant, if he desired to sue in the Circuit Court, must have proceeded at law on his notes alone, specifying their character as commercial. The mortgage being a separate and distinct instrument, is not involved in the note, as is evidenced by the fact that suit might have been brought on the note alone.

The complainant has really no replication, and the answer is practically confessed to be true. The replication contains no general denial of anything, but asserts a conclusion of law that the cause of action did arise within the jurisdiction of this Court.

Complainant practically admits the averments of the answer that the assignments were made solely to give Circuit Court jurisdiction.

104 U. S. Sup. Ct. 210.

The case should have been dismissed on the Court's own motion.

Again the bill does not conform to rule 20 nor to rule 24, requiring signature of counsel.

The case should be dismissed and the parties permitted to pursue their remedies in the State Courts.

A. CHESTER,
of Counsel.

17-323

OFFICE SUPREME COURT U.S.
FILED
APR 7 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1882.—No. 249.

S. V. TREDWAY AND DAVID KETTLEMAN,

APPELLANTS,

vs.

CHARLES W. SANGER.

Appeal from the Circuit Court of the United States for the District of California.

Brief for Appellee.

HENRY BEARD AND
CHARLES H. ARMES,
Attorneys for the Appellee.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

Supreme Court of the United States.

October Term, 1882.—No. 249.

S. V. TREDWAY AND DAVID KETTLEMAN,
APPELLANTS,

vs.

CHARLES W. SANGER.

Appeal from the Circuit Court of the United States for the District of California.

Brief for Appellee.

STATEMENT OF THE CASE.

This was a bill in equity, filed by Charles W. Sanger, the appellee, against S. V. Tredway and David Kettleman, the appellants, in the Circuit Court of the United States for the District of California, December 19th, 1878, to collect a debt and foreclose a mortgage. The bill avers that the appellee is a resident and citizen of the State of Pennsylvania. That appellants are residents and citizens of the State of California. (Record, 1–2.) That on September 28th, 1875, at San Francisco, in the State of California, the appellants made their two certain promissory notes, each for $2,342.52, with interest at ten per cent. per annum, in said bill described, payable in one and two years after date respectively, to Charles McLaughlin or order, and delivered the same to said McLaughlin. That appellants, to secure said notes, at the same time and place, did execute and deliver to said McLaughlin a certain mortgage, a copy whereof is filed with and made

a part of the bill of complaint, which said mortgage was duly recorded. "That said Charles McLaughlin thereafter endorsed said promissory notes, and delivered them so endorsed to one W. H. Dillon. That said W. H. Dillon thereafter endorsed said promissory notes and delivered them so endorsed, and the complainant thereafter became, and now is, the owner and holder thereof for value." (Record, 2.) That all the principal and interest mentioned in said notes is due, and none of it has been paid, and that demand therefor has been made. (Record, 3.) That this suit is brought under an act of Congress of the United States approved March 3d, 1875.

The prayers of the bill are for judgment against said S. V. Tredway and David Kettleman for the sum of $4,685.04, with interest from the date of the notes, according to the terms of the notes; for costs and solicitors' fees, and for the usual decree for the sale of said mortgaged premises; the application of the proceeds of sale to the payment of the amount due complainant, and for judgment and execution against said Tredway and Kettleman for any deficiency of the sale of said premises properly applicable to the satisfaction of said judgment; also, the usual formal prayers in such cases. (Record, 3.)

The appellants filed a plea in abatement, (Rec., 6–7) alleging that Charles McLaughlin, the payee named in said notes, is the person to whom said notes were made and said mortgage executed and delivered, and that he and the said appellants were, at the time of the making thereof, and ever since have been, and are, citizens of the State of California; and admitting that said Sanger is, and was, as alleged in the bill, a citizen of the State of Pennsylvania; and further admitting that "said Charles McLaughlin endorsed said promisory notes and delivered them so endorsed to W. H. Dillon, and that said W. H. Dillon thereafter endorsed the same and delivered the same

so endorsed;" but they charge, upon information and belief, that said endorsements and delivery were colorable merely, and the endorsement and delivery by said W. H. Dillon were made and done solely for the purpose of conferring jurisdiction upon said circuit court to determine this cause. And said plea charges, on information and belief, that said appellee is not the owner and holder of said promissory notes for value.

A replication to said plea was filed, (Rec., 8); and thereupon, for the purpose of the trial of the issue presented by said plea, a *stipulation* signed by counsel for the respective parties was filed (Rec., 8–9) stating that the said S. V. Tredway and David Kettleman and Charles McLaughlin "were at the time of the making of said note and of the execution of said mortgage, and have been ever since, and now are, residents and citizens of the State of California, and that Charles W. Sanger, the complainant in this action, was, at the commencement of this action, and had been for a long time previous, and is now, a *bona fide* resident and citizen of the State of Pennsylvania."

The subsequent proceedings in the cause sufficiently appear in the final decree, wherein a succinct history of the cause is recited, as follows (Rec, 11):

> "In this case, the defendants, having been regularly served with process, and having appeared, and having interposed a plea in abatement to the bill of complaint in the above-entitled cause, and the complainant having filed a replication thereto, and this cause having come on to be heard before the court upon said issue, the Honorable Lorenzo Sawyer presiding, and the matter having been tried, argued, and submitted to the court for consideration and decision; and the court, being duly advised therein, did, on the 11th day of September, A. D. 1879, find that said plea was not true, and was insufficient; and the time within which said defendants, and each of them, to wit, October 6, A. D. 1879, should have answered said bill, having expired,

> and no answer having been filed by said defendants, or either of them, and the defaults of said defendants, S. V. Tredway and David Kettleman, having been regularly entered for want of an answer unto said bill of complaint, and the said defaults having been entered on the 29th day of October, A. D. 1879, and the said bill being taken for confessed."

The court thereupon, among other things, adjudged and decreed that there was due to the complainant from the defendants $6,647.52, principal and interest, in gold coin of the United States of America, and $335 counsel fees; and that the plaintiff has a lien upon the mortgaged premises for the payment of the same; and that said sums bear interest at seven per cent. per annum from the date of the decree; and proceeded to appoint a special master of the court to sell the mortgaged premises, subject to redemption, as provided in the laws of the State of California, and gave specific directions in the premises. (Rec., 11, 12, and 13.) If the proceeds of the sale were insufficient to pay the judgment and costs, that the clerk of the court should docket a judgment against the defendants for any balance found due the plaintiffs. This decree was entered December 6, 1879.

Argument.

The only assignment of error of counsel for the appellants, as we understand his brief, is contained in the first paragraph of page 2, and it is as follows:

> "That the decree finds the plea in abatement not true and insufficient, notwithstanding the stipulation of facts which show the plea to be well taken."

From this alleged error he proceeds to argue: *That the Circuit Court has no jurisdiction of an action to foreclose this mortgage, for the reason that McLaughlin, the original mortgagee, could not maintain a bill for that purpose.*

We reply, that the finding of the Circuit Court on the plea filed, is in accordance with the facts contained in the said stipulation, and that the Circuit Court had jurisdiction of the cause.

AS TO THE FINDING ON THE PLEA AND STIPULATION.

The stipulation referred to is filed as an admission, as to the residences and citizenship of the respective parties to the suit, and of the mortgagee and payee named in the notes in question. It is agreed therein that the citizenship of all the above-mentioned persons is as alleged in the bill. The plea also contains, in substance, and in almost the same words of the bill, the plaintiff's averments as to said citizenship. In fact, the bill, plea, and stipulation set forth, in nearly identical language, that said defendants (the mortgagors) and said Charles McLaughlin (the mortgagee and payee named in the notes) "*were, at the time of the making of said note and of the execution of said mortgage, and have been ever since, and now are, residents and citizens of the State of California; and that Charles W. Sanger, the complainant in this action, was, at the commencement of this action, and had been for a long time previous, and has been ever since the commencement of the action, and is now, a bona fide resident and citizen of the State of Pennsylvania.*" (Rec. p. 9.)

There is no evidence in the record tending to sustain the averment in the plea, made upon information and belief only, that the endorsement and transfer of the notes was "made and done solely for the purpose of conferring jurisdiction upon the circuit court;" and in the absence of such evidence, there is no foundation for argument on that question. No evidence is offered in support of any facts alleged in the plea.

The record in the case admits, we think, the discussion of only one question, viz: Had the Circuit Court jurisdiction to hear and determine the cause as presented to it in the bill of complaint? And this question must be answered in the affirmative.

The cause is here on appeal from the final decree of the Circuit Court, rendered on the 6th day of December, 1883, (Record, 11,) and not from the order of the court overruling the plea. Upon overruling the plea, the court ordered the defendants to answer, and in default of an answer the bill was taken for confessed; and thereupon, in conformity with the rules of equity, the matters of the bill, sufficiently alleged, were decreed. No exception has been or can be taken by counsel for the appellants to the regularity of the proceedings.

The act of Congress of March 3d, 1875, Section 1, (18th Stat., p. 470,) under which this suit is brought, enacts that—

> "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds * * * five hundred dollars, * * * in which there shall be a controversy between citizens of different States. * * * But no person shall be arrested in one district for trial in another, * * * and no civil suit shall be brought * * * against any person by any original process * * * in any other district than that whereof he is an inhabitant, * * * except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

The notes mentioned in this cause are "promissory notes negotiable by the law merchant," and are therefore within

the plain provisions of the above law giving the Circuit Court jurisdiction; the assignee, being, as alleged and admitted, a resident of the State of Pennsylvania, brought his suit against the makers of the notes, who are citizens of the State of California.

In the State of California, "the assignment of a debt secured by mortgage carries with it the security."

Code and Statutes of Cal., Vol. I., Sec. 2,936, par. 7,936.

The case of *Sheldon* vs. *Sill*, 8 How., 441, cited in appellant's brief, turned upon a clause in Sec. 11 of the Judiciary Act of 1789, which, (as was said by the Chief Justice, speaking for the court in the case of *Ober* vs. *Gallagher*, 93 U. S., at p. 205,) has been "repealed by the Act of March 3, 1875. In that case, however (*Sheldon* vs. *Sill*, at p. 450), the court, speaking of the nature of a mortgage, said:

> "In equity, the debt or bond is treated as the principal and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or lien, on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance. . .
>
> "The complainant in this case is the purchaser and assignee of a sum of money, a debt, *a chose in action*, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is, therefore, the assignee of a chose in action, within the letter and spirit of the Act of Congress under consideration, and cannot support this action in the circuit court of the United States, where his assignor could not."

The Court, at page 448 in said opinion, referring to the law then under consideration, said:

> "The 11th Section of the Judiciary act, which defines the jurisdiction of the Circuit Courts, restrains them from taking cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

This case was much like the case at bar, but the law under which it was decided is no longer in force. The observations of the court as to the nature of a mortgage are in accord with the statute in California, and are applicable to the case at bar. The proceeding in the case at bar is one to recover the amount of money and interest mentioned in two *promissory notes negotiable by the law merchant*, to which the security is an incident; and though the Circuit Court had not jurisdiction of such a case when *Sheldon* vs. *Sill* was decided, because of the inhibition in the statute then in force, it has jurisdiction *now* by the act of March 3d, 1875.

If, however, the Circuit Court, in *Sheldon* vs. *Sill*, had acquired rightful jurisdiction of the parties, and the subject-matter of the action *for any purpose*, it could have proceeded to judgment on the notes and foreclosure of the mortgage, as the law, even then, stood. This was done in a similar case in the United States Circuit Court for the Eastern District of Arkansas. There suit was commenced to subject real estate to the satisfaction of a judgment on a note in favor of an assignee of the note, where a lien had been reserved by deed to secure payment of that and a series of other notes given for deferred purchase money. The bill was amended by consent, alleging that complainant, as assignee, held the rest of the series of notes, and making the same prayer as to those which were now overdue that he

did in his original bill as to said judgment. The Circuit Court, in 1874, (before the enlargement of the jurisdiction of the Circuit Courts,) rendered a decree finding the amount due complainant on said judgment *and upon said notes*, establishing a lien for the whole amount, as prayed, and ordering a sale in satisfaction thereof.

On appeal to this court, appellants claimed that the maker and the payee of the notes being citizens of the same State when the suit was brought, the assignee of the notes could not sue in the United States Circuit Court, because his assignor could not. And this court remarked that the complainant "did not sue in this case originally as the endorsee of a note, but as the owner of a judgment of record in his own favor, secured by a lien which he asked to have enforced. * * * The court had, therefore, jurisdiction of the suit as originally brought. * * * Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

Ober vs. *Gallagher*, 93 U. S., p. 205–6.

The court further remarked that "the suit is in reality one to enforce a mortgage given to secure a note, but not commenced until after the note had gone into judgment at law." (*Ib.*, p. 208.)

The Circuit Court having, by the act of March 3d, 1875, jurisdiction of a suit, by the assignee, C. W. Sanger, to collect the notes in question by the express terms of the law, it seems unquestionably clear that it had jurisdiction effectual for complete relief by enforcing the lien given to secure payment of the notes.

The objection made in the appellants' brief that the bill was not signed by counsel is probably an inadvertence, for

the record shows, at page 3, the signature of Tully R. Wise as solicitor for complainant. The question made as to the sufficiency in form of the replication, if it were a valid objection, comes too late, after taking a step in the cause. No authority is referred to showing that a paper filed as a replication, which is treated by all parties to the suit as putting in issue the matters opposed to the bill, can be objected to as insufficient for that purpose, after all parties proceed with their evidence; and, the record does not show that the attention of the Circuit Court was called to any alleged irregularities in the pleadings.

Bradstreet vs. *Potter*, 16 Pet., 317.

The appellant, having pleaded matter in bar of this suit, which he made no attempt whatever to sustain by proof, it seems to us so obvious that the appeal was taken merely for delay that we feel constrained to ask that rule 23 be applied, and that the judgment below be affirmed with ten per centum damages.

The justice of such action in the case by this court cannot be questioned when it appears on the record that the appellants promised to pay ten per centum upon the amount of the notes "until paid," whereas by the decree only seven per centum accrues upon the amount due at its date—December 6th, 1879.

HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Appellee.